No. 06-223

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In The
Supreme Court of the United States

JOHN DREBICK and JANE DOE DREBICK,
husband and wife, d/b/a DREBICK INVESTMENTS,

Petitioners,

v.

CITY OF OLYMPIA, a Washington code city,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Washington

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should deny the Petition for Writ of Certiorari because this case presents no federal question since this Court and the lower federal and state courts have uniformly and consistently held that the heightened takings standards articulated in *Nollan* and *Dolan* do not apply to the type of legislatively established generally applicable impact fees at issue in this case.

2. Whether this Court should deny the Petition for Writ of Certiorari because, consistent with this uniform authority, the Washington Supreme Court correctly applied the appropriate standard to uphold the impact fees at issue in this case.

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INTRODUCTION[1]

This case involves the Washington Supreme Court's straightforward decision to affirm a requirement that a local developer pay a city transportation impact fee (TIF) levied pursuant to a Washington statute and an ordinance adopted by the Olympia city council. In so ruling, the Washington Supreme Court refused to apply the heightened "essential nexus" and "rough proportionality" standards articulated in *Nollan v. California Coastal Commission*[2] and *Dolan v. City of Tigard*.[3] Neither the United States Supreme Court nor the Washington Supreme Court has determined that the tests used in those cases to evaluate land exactions should be "extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances."[4]

Despite this unremarkable ruling, Drebick seeks this Court's review, claiming its recent clarification of regulatory takings law in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) "left unsettled" the applicability of the *Nollan/Dolan* standard to legislative, as opposed to adjudicative, exactions.

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[1] The City has not included herein a list of parties to the proceeding, the citations of official and unofficial reports of the opinions and unofficial reports of opinions and orders entered in the case, the statement of the basis for jurisdiction, or the constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case because the City is satisfied with their presentation by Drebick. SUP. CT. R. 15(3); SUP. CT. R. 24(2).

[2] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

[3] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

[4] Appendix A-12 (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999)).

Petition for Writ of Certiorari, at 3 (citing *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998)). As a result of *Lingle*, Drebick asserts that a conflict now exists between lower state courts regarding the correct application of *Nollan* and *Dolan*, and that this alleged conflict merits review by this Court. Drebick is in error on both counts.

First, this Court's recent quartet of regulatory takings decisions leaves no doubt that *Nollan* and *Dolan's* heightened standards apply only to (1) ad hoc, adjudicative land use decisions (2) conditioning development approval on the dedication of real property. Indeed, this Court's most recent ruling in *Lingle*, in language unacknowledged by Drebick, affirms this Court's prior decisions:

> Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to *adjudicative land-use exactions* – specifically, government demands that a landowner *dedicate an easement* allowing public access to her property as a condition of obtaining a development permit.
>
> * * *
>
> The Court further refined this requirement in *Dolan,* holding that an *adjudicative exaction* requiring dedication of private property must also be "rough[ly] proportiona[l]" . . . both in nature and extent to the impact of the proposed development.
>
> * * *
>
> . . . *Nollan* and *Dolan* both *involved dedications of property* so onerous that, outside the exactions context, they would be deemed *per se* physical takings.

Lingle, 544 U.S. at 546-47 (emphasis added). This Court's decisions conclude that *Nollan* and *Dolan* do not apply

where legislatively imposed fees are not the functional analog of real property dedications.[5] Drebick's assertion that the issue is unresolved lacks merit.[6]

Drebick's second contention – that there is a "split" among lower courts regarding the application of the *Nollan/Dolan* standard – is also incorrect. Lower state and federal courts have consistently followed this Court's guidance beginning with *Del Monte Dunes* in 1999, and continuing through *Lingle* in 2005.[7] To the extent Drebick cites cases purportedly to the contrary, most were decided before this Court issued its decisions in these important cases; others are materially distinguishable.

In sum, this Court's takings precedent resolves the issue on which Drebick seeks review. The Washington Supreme Court's decision is consistent with this precedent, as are the decisions of the lower federal and state courts. There is no split among the lower federal or state courts and no federal question presented. Therefore, nothing warrants this Court's review.

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[5] *See Del Monte Dunes*, 526 U.S. at 702-03 (1999). *See also Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Lingle*, 544 U.S. 528.

[6] Drebick fails to explain how its citation to the Ninth Circuit's 1998 *Garneau* decision, issued seven years prior to this Court's decision in *Lingle*, supports the proposition that the issue remains "unsettled."

[7] After *Lingle*, state courts have determined that *Nollan* and *Dolan* apply only to adjudicative exaction of a dedication of real property. *See Wisconsin Builders Ass'n v. Wisconsin Dept. of Transp.*, 702 N.W.2d 433 (Wis. App. 2005); *Herzberg v. County of Plumas*, 34 Cal.Rptr.3d 588 (Cal. App. 2005). Drebick cites neither of these recent cases.

COUNTERSTATEMENT OF THE CASE

In 1990, as part of a continuing struggle to manage growth and to contain urban sprawl, the Washington State Legislature adopted the Growth Management Act ("GMA"). RCW Ch. 36.70A. This comprehensive planning statute is designed to give local governments the authority and resources necessary to plan for and to manage growth and development within their communities.

As part of the GMA, the Washington Legislature adopted RCW 82.02.050-.090, authorizing local governments to condition development approval on the payment of impact fees to defray a portion of the costs arising from new growth and development. The Legislature's express intent is to establish "standards by which . . . [local governments] may require, by ordinance, that new growth and development pay a proportionate share of the cost of the new facilities needed to serve new growth and development. . . ." RCW 82.02.050(1)(b). As a safeguard, the Legislature requires that a local government's "procedures and criteria" for imposing impact fees must protect "specific developments" from impact fees that are "arbitrary" or that duplicate the amount paid for "the same impact." *Petition for Writ of Certiorari,* Appendix ("Appendix") A-5.

Exercising the authority granted by RCW 82.02.050(2)[8] and adhering to the requirements of RCW 82.02.060,[9] the

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[8] Under this provision, local governments may use GMA impact fees to pay only part of the cost of system improvements needed to serve new development; such costs cannot be funded solely through impact fees. RCW 82.02.050(2).

[9] RCW 82.02.060 requires that the local ordinance by which impact fees are imposed must include a schedule of impact fees which are adopted for each type of development activity. That schedule must be

(Continued on following page)

City adopted a TIF ordinance. As authorized by RCW 82.02.060(6), the City elected to base its fee structure on a single service area coterminous with its designated urban growth area (UGA). Appendix E-14.[10] As summarized in the hearings examiner's decision, the City calculated the TIF amounts based on traffic volumes generated by various classes of new development. It did so by (1) projecting the total number of new trips generated by new development; (2) projecting the total cost of transportation projects needed to serve new growth expected in the next six years, not including existing deficiencies or pass-through traffic; (3) dividing the projected cost by the projected number of trips to derive the average cost of a new trip; and (4) converting this average cost into impact fees for specific types and sizes of development. Appendix E-13. The City's TIF ordinance also allowed developers to request departures from the fee schedule and permitted

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based on a formula which incorporates (1) the cost of public facilities necessitated by new development; (2) an adjustment to the cost of the public facilities for past or future payments made or reasonably anticipated to be made by new development to pay for a particular system; (3) the availability of other means of funding; (4) the cost of existing public facilities improvements; and (5) methods by which the improvements were financed. RCW 82.02.060(1)(a)-(e). It also requires the local impact fee ordinance to (1) provide a credit for the value of any land dedicated for the improvement or construction of system improvements provided by the developer to facilities identified on the capital facilities plan; (2) allow the city to consider unusual circumstances in specific cases to ensure that the fees are imposed fairly; (3) include a provision for calculating the amount of the fee to be imposed on a particular development that permits consideration of studies and data submitted by the developer to adjust the amount of the fee, if appropriate; and (4) establish one or more reasonable service areas within which impact fees for various land uses categories are calculated and imposed. RCW 82.02.060(2)-(6).

[10] Drebick did not challenge the City's decision to establish a single service area.

the City to consider independent fee calculations on a case-by-case basis. Appendix E-6.

In July 1998,[11] Drebick submitted a land use application for a new 54,698 square-foot office building to be constructed within the Olympia city limits. Appendix E-5. The City approved Drebick's proposal, subject to payment of the applicable TIF. *Id.* Although Drebick requested that the City apply one of three alternative independent fee calculation amounts, the City denied the request because the methodology Drebick used to calculate those amounts failed to meet the TIF ordinance's accuracy and reliability criteria. Appendix E-6 – E-8.

Drebick appealed the denial to the hearings examiner, who concluded that Drebick's proposed building contained no unique or special characteristics justifying an independent fee calculation. Appendix E-27, E-55. The hearings examiner then made the following unchallenged findings regarding the City's legislatively adopted impact fee:

> 34. . . . [T]he impact fee assessed a specific development *is proportionate to and reasonably related to the jurisdiction-wide need for new transportation improvements created by that development.*
>
> 35. . . . Under Olympia's method the transportation impact fee assessed a specific development *is used for improvements that will reasonably benefit that development, if benefit is judged by*

[11] The Petition for Writ of Certiorari erroneously lists the date as July, 1988. *Petition for Writ of Certiorari*, 4.

> *the effect of the transportation improvements in the jurisdiction as a whole.*

Appendix E-14 (emphasis added).[12] Notwithstanding these important findings, the hearings examiner reversed the City's decision, asserting that Drebick's TIF assessment did not meet the statutory relationship and proportionality standards set forth in RCW 82.02.050.[13] Appendix E-55. The trial court reversed and reinstated the TIF, concluding (as the hearings examiner did) that the fee was proportionate and related to the City's jurisdiction-wide need for transportation improvements necessitated by new development in accordance with RCW 82.02.050. Appendix D-6. Drebick appealed the decision to the Court of Appeals, which reversed and remanded the matter to the City for a recalculation of the TIF, reasoning that it could not exceed "the individualized impacts of Drebick's specific project." Appendix C-23.

The Washington Supreme Court reversed that decision, holding that the City's legislatively established method for calculating TIFs complied with the relational standards prescribed in RCW 82.02.050(3). Appendix A-19 – A-20. Countering the dissent's unsupported assertion that the Legislature intended to adopt the *Nollan/Dolan* heightened regulatory takings standard as part of that

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[12] These unchallenged findings are verities on appeal. *State v. Moses*, 422 P.2d 775 (Wash.), *appeal dismissed, cert. denied*, 389 U.S. 428, *reh'g denied*, 390 U.S. 930 (1967).

[13] Impact fees imposed pursuant to GMA must: (1) only be imposed for system improvements that are reasonably related to the new development; (2) not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and (3) be used for system improvements that will reasonably benefit the new development. RCW 82.02.050(3)(a)-(c).

statute, the Court emphasized that neither of those cases address the imposition of impact fees. Instead, those cases address the authority of a local government to condition development approval on a property owner's dedication of property for a public use. Appendix A-11 – A-12. The Washington Supreme Court explained further that the dissent "inaptly" cited decisions from other jurisdictions applying the *Nollan/Dolan* standard to direct mitigation fees (covered by a different statutory provision in Washington), not to the legislatively prescribed impact fees at issue in this case. Appendix A-12. Determining that the heightened review standards of *Nollan* and *Dolan* do not apply to legislatively adopted TIFs, the Washington Supreme Court held that "the GMA impact fee statutes do not require local governments to calculate an impact fee by making individualized assessments of the new development's direct impact on each improvement planned in a service area." Appendix A-1.

SUMMARY OF REASONS TO DENY THE WRIT

1. Legislatively adopted, generally applicable impact fees are not the proper subject of regulatory takings analysis, especially one requiring heightened scrutiny. This Court has routinely held that the heightened essential nexus and rough proportionality standards articulated in *Nollan* and *Dolan* apply only in the limited, narrow context where the dedication of real property is required as a condition of development approval.

2. There is no split among the lower courts, which uniformly agree that the heightened regulatory takings standards set forth in *Nollan* and *Dolan* do not apply to

legislatively enacted, generally applicable impact fees designed to fund infrastructure improvements within communities at large.

3. Consistent with the uniform holdings in cases from this Court and jurisdictions around the country, the Washington State Supreme Court correctly concluded that *Nollan* and *Dolan* do not apply to the City's legislatively enacted TIF.

ARGUMENT

This case presents no issue of federal law, nor is there any conflict among the lower federal or state courts. It is well-established that legislatively adopted, generally applicable impact fees are not subject to constitutional takings analysis in the first instance. Even if they were, this Court has made clear that the test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) would apply. Contrary to Drebick's arguments, no lower federal or state court has ever applied the individualized, heightened scrutiny called for by *Nollan* and *Dolan* to legislatively adopted, generally applicable impact fees. Drebick's attempt to manufacture conflict among the lower courts is a transparent attempt to convince the Court to revisit its clear takings precedent. The Petition for Writ of Certiorari should be denied.

A. Legislatively Adopted Impact Fees Are Not Subject To Constitutional Takings Analysis So Further Review By This Court Is Unwarranted.

As revenue raising measures imposed under a local government's taxing authority, impact fees and other

similar "user fees" are not subject to constitutional takings analysis. As this Court has recognized, simply asking a party to pay a fee does not implicate private property rights or the Takings Clause of the Fifth Amendment. *United States v. Sperry Corp.*, 493 U.S. 52 (1989). In *Sperry*, this Court rejected an assertion that monetary deductions from awards made by the Iran-United States Claims Tribunal in favor of United States claimants were takings, stating that

> [i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. . . . If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*.

Sperry, 493 U.S. at 62 n.9 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). *See also Brown v. Legal Foundation of Washington*, 538 U.S. 216, 242 n.2 (2003) (Scalia, J. dissenting) (" . . . I am unaware of *any* use to which state taxes cannot constitutionally be devoted. . . . Taxes and user fees, since they are not 'takings,' *see United States v. Sperry Corp.*, 493 U.S. 52, 63, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989), are simply not subject to the 'public use' requirement, and so their constitutional legitimacy is entirely irrelevant to the existence *vel non* of a public use"). State courts are in accord, even where the fee at issue is charged as a condition of development approval. *Dudek v. Umatilla County*, 69 P.3d 751, 757 (Or. App. 2003) ("[T]he 'mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment'") (citing *Kitt v. U.S.*, 277 F.3d 1330, 1336 (Fed. Cir.), *modified on reh'g on*

other grounds, 288 F.3d 1355 (Fed. Cir. 2002) (quoting *Commonwealth Edison Co. v. U.S.*, 271 F.3d 1327, 1340 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002))).

Consistent with this line of reasoning, Washington courts have expressly acknowledged that impact fees are not regulatory, but are essentially revenue-raising taxes. *New Castle Investments v. City of LaCenter*, 989 P.2d 569, 575 (Wash. App. 1999), *review denied*, 5 P.3d 9 (Wash. 2000) (" . . . TIFs are fees that augment tax dollars; they are another source of revenue for improvements that benefit the public in general, and they are not intended to regulate the particular development"). As a result, the Washington Supreme Court in this case did not conduct a regulatory takings analysis, but instead focused its inquiry on whether the impact fee was imposed consistent with its statutory authority. Appendix A-3, n.1. Concluding it was, the Court properly ended its inquiry. This case presents no question worthy of this Court's review, and Drebick's Petition for Writ of Certiorari should be denied.

B. This Court has Repeatedly Held that the *Penn Central* Test Applies to Regulatory Takings Claims.

Even if a regulatory takings analysis applies to legislatively adopted, revenue-raising impact fees, this Court has made clear through the series of cases beginning with *Del Monte Dunes* that regulatory takings claims are properly evaluated under the factors set forth in *Penn Central*. *Del Monte Dunes*, 526 U.S. at 702-03 (refusing to extend *Dolan's* heightened scrutiny beyond the special context of land use decisions conditioning approval of development on the dedication of property to a public use); *Palazzolo*, 533 U.S. at 616-18 (concluding regulatory

takings claim resulting from wetlands regulations should have been evaluated under the principals set forth in *Penn Central*); *Tahoe-Sierra Preservation Council,* 535 U.S. at 322 ("Our regulatory takings jurisprudence . . . is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries,' *Penn Central*, 429 U.S. at 124, 98 S.Ct. 2646, designed to allow 'careful examination and weighing of all the relevant circumstances.'") (citation omitted); *Lingle*, 544 U.S. at 540, 546 (outside of context of permanent physical invasions, regulatory deprivation of "all economically beneficial use," and land use exactions requiring the dedication of property, regulatory takings challenges are governed by the *Penn Central* test).[14] Nothing about the Washington Supreme Court's decision in this case contradicts this well-established precedent, and there is no issue warranting further review.

Nollan and *Dolan* involved the government's exaction of an interest in specific real property, not simply the payment of money. This Court and others have routinely made clear that the heightened review standards articulated in *Nollan* and *Dolan* apply only to ad hoc development conditions requiring the dedication of real property. In *Del Monte Dunes*, this Court refused to apply *Dolan's* heightened takings standards to a city's repeated rejections of development proposals, stating

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[14] Under the *Penn Central* test, where a regulation places limitations on land that fall short of eliminating all economically beneficial use, courts evaluate whether a taking has nevertheless occurred based on the more deferential application of a complex set of factors. These factors include "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 533 U.S. at 617 (citing *Penn Central*, 438 U.S. at 124). *Accord Guimont v. Clarke*, 854 P.2d 1 (Wash. 1993), *cert. denied*, 510 U.S. 1176 (1994).

that *Dolan's* rule considers whether dedications demanded as conditions of development approval are proportional to the development's anticipated impacts. *Del Monte Dunes*, 526 U.S. 702-03. This Court has specifically declined to extend the rule beyond the special context of land use decisions conditioning approval of development on the dedication of property to public use. *Id. See also Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 973 (Or. App. 2002), *cert. denied,* 538 U.S. 906 (2003) (refusing review of an Oregon Supreme Court ruling that TIFs are not subject to *Nollan* and *Dolan's* heightened scrutiny).

In *Lingle,* the Court reinforced the limited applicability of *Nollan* and *Dolan.* That case involved a challenge to a Hawaii statute limiting the amount of rent that oil companies could charge dealers leasing company-owned stations. Although the Court focused its analysis on the inappropriate use of the "substantially advances" test as part of regulatory takings jurisprudence, in doing so, it comprehensively summarized the current state of regulatory takings law. According to the Court, with the exception of two narrow categories, which are (1) the deprivation of all economically viable use (governed by *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992)); and (2) land use exactions where government has demanded landowners dedicate a portion of their property for public use as a condition of obtaining development approval (governed by *Nollan* and *Dolan*),[15] all other regulatory takings claims

[15] *See Lingle*, 544 U.S. at 574 (citing *Dolan*, 512 U.S. at 385) ("As the Court explained in *Dolan*, these cases involve a special application of the 'doctrine of "unconstitutional conditions," ' which provides that 'the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the

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are properly governed by the *Penn Central* balance of factors.[16] *Lingle*, 544 U.S. at 538, 546. *See also Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (*Nollan* and *Dolan* "are limited to the context of development exactions where there is a physical taking or its equivalent"); *Commercial Builders v. Sacramento*, 941 F.2d 872, 875 (9th Cir.), *cert. denied*, 504 U.S. 931 (1991) (*Nolan* inapplicable to housing mitigation fee). The *Lingle* court emphasized that adjudicatory decisions conditioning development approval on the dedication of real property are singled out for heightened scrutiny under *Nollan* and *Dolan* because they are tantamount to physical appropriations. *Lingle*, 544 U.S. at 546-47. The same is not true for legislatively adopted formulaic impact fees, which are consistently applied to all new development to raise revenue for infrastructure improvements necessitated by new development generally.

C. Consistent with This Court's Pronouncements, No Court Has Ever Applied *Nollan* and *Dolan's* Heightened Scrutiny to Legislatively Adopted Impact Fees.

Despite Drebick's arguments to the contrary, there is no conflict among the lower federal and state courts, whose decisions are entirely consistent with existing precedent. No lower federal or state court has ever applied *Nollan* and *Dolan's* individualized, heightened scrutiny to legislatively adopted impact fees, which are traditionally

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government where the benefit has little or no relationship to the property' ").

[16] Permanent physical invasions of property are governed by *Loretto*, 458 U.S. 419.

afforded greater deference. "It has long been axiomatic that legislative and quasi-legislative enactments enjoy a significantly higher degree of judicial deference than individualized adjudications." *Homebuilders Ass'n of Metropolitan Portland v. Tualatin Hills Park and Recreation Dist.*, 62 P.3d 404, 410 (Or. App. 2003) (citing *Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445 (1915); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)).[17]

> One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system. When a governmental entity assesses a generally applicable, legislatively based development fee, all similarly situated landowners are subject to the same fee schedule, and a specific landowner cannot be singled out for extraordinary concessions as a condition of development.

Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) (citing *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) and *Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist.*, 53 Cal.Rptr.2d 424, 434 (1996)).

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[17] *See also San Remo Hotel, LP v. City and County of San Francisco*, 41 P.3d 87, 103 (Cal.4th 2002) (citing *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 966 (Cal.4th 1999) (quoting *Dolan*, 512 U.S. at 385) (" . . . The most deferential review of land use decisions appears to be for those that pertain to 'essentially legislative determinations' that do not require any physical conveyance of property' ")); *Rogers Machinery*, 45 P.3d at 973 ("[W]hen the government regulates property without physically occupying it, the Takings Clause is much less protective of the interests of the property owner and much more deferential to the public interests served.")

Notwithstanding this important distinction, Drebick nevertheless argues that the heightened standards of *Nollan* and *Dolan* should apply to legislatively adopted, generally applicable impact fees. This argument, however, has been consistently rejected by courts that considered it.[18] In an unpublished decision cited by Drebick, *Nat'l Ass'n of Home Builders of the United States, et al. v. Chesterfield County,* 92 F.3d 1180, 1996 WL 423061 at *1 (4th Cir. 1996) (unpublished), *cert. denied,* 519 U.S. 1056 (1997), the Fourth Circuit expressly rejected the argument that *Dolan's* rough proportionality standard required the county to make a stringent, individualized determination before calculating the appropriate fee due under the county's cash proffer policy. According to the court, "[s]uch a requirement approaches 'exact proportionality' which is not required under the Constitution, nor feasible in practice" because the fees prescribed will apply even to projects that have not yet even been conceived. *Nat'l Ass'n of Home Builders of the United States,* 1996 WL 423061 at *2.

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[18] Moreover, if Drebick contends that such fees are subject to *Nollan* and *Dolan's* heightened scrutiny, then all forms of taxation would be susceptible to such challenge. The Washington Supreme Court has determined that the imposition of generally applicable fees designed to raise revenue for needed capital improvements is a tax, requiring statutory authorization to be valid. *Hillis Homes v. Snohomish County*, 650 P.2d 193 (Wash. 1982), *superseded by statute as stated in Ivy Club Investors, Ltd. Partnership v. City of Kennewick,* 699 P.2d 782 (Wash. App. 1985). Here, Drebick does not challenge an ad hoc adjudicatory exaction of real property like those at issue in *Nollan* and *Dolan*, but instead challenges the ability of state and local governments to exercise their taxing authority to raise revenue generally. The City is aware of no authority that would subject such excise taxes to a regulatory takings analysis, much less heightened scrutiny under *Nollan* and *Dolan.*

Decisions from courts in Colorado, Oregon, Arizona, Kansas and Maryland have consistently held that *Nollan* and *Dolan's* heightened scrutiny does not apply to legislatively mandated fees. In *Krupp*, the Colorado Supreme Court affirmed a decision that legislatively adopted plant investment fees[19] charged to all building projects within a sanitation district were not subject to the *Nollan/Dolan* takings analysis.

> Each PIF assessment is calculated by publicly promulgated standards that are applicable to all new developments within the District. The *PIF is not imposed adjudicatively* in the *Nollan/Dolan* sense, and is not an assessment unique to the Krupps. Moreover, the PIF is neither a land use regulation *nor an exaction of property* as a condition of development. Consequently, it does not fall into the relatively narrow category of development exactions addressed by *Nollan* and *Dolan*.

Krupp, 19 P.3d at 698 (emphasis added).

In *Rogers Machinery*, the Oregon Supreme Court similarly refused to apply the *Nollan* and *Dolan* analysis to legislatively adopted TIFs,[20] stating:

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[19] A PIF is a one-time charge, calculated under an established schedule, designed to defray the cost of expanding infrastructure as development increases the demand for services. The PIF must be paid before the town issues a building permit or certificate of occupancy for a new building. *Krupp*, 19 P.3d at 691.

[20] Notably, amici curiae in the *Rogers Machinery* case made precisely the same argument Drebick makes here – that lower courts are split regarding whether *Nollan* and *Dolan* apply to legislatively adopted fees. Brief of Amici Curiae New England Legal Foundation and Atlantic Legal Foundation In Support of Petitioner, Rogers Machinery

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> . . . no significant discretion is involved in the TIF's imposition or calculation. Imposition of the TIF is mandatory on broad classes of property. . . . The TIF ordinance is, in short, precisely the kind of detailed and uniformly applied legislative assessment scheme that courts in other states hold does not fall within the express reach of the implicit rational of *Dolan's* heightened scrutiny test.

Rogers Machinery, 45 P.3d at 981-82.[21] *See also Homebuilders Ass'n of Metropolitan Portland*, 62 P.3d at 409 ("We conclude that . . . the *Nollan/Dolan* 'rough proportionality' test does not apply in determining whether the SDC [system development charge] in this case is a taking for Fifth Amendment purposes.")

In *Home Builders Ass'n of Central Arizona*, the court upheld a challenge to the city's legislatively adopted,

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Co., Inc. v. City of Tigard, No. 02-0750, On Petition for Writ of Certiorari to the Oregon Court of Appeals, 2002 WL 32133662, *6-9 (Dec. 16, 2002). As discussed herein, this Court denied the Petition for Writ of Certiorari in *Rogers Machinery*, and should do the same here.

[21] Moreover, courts that have narrowly extended the heightened review standard have uniformly reasoned that the extension is appropriate because – unlike legislatively adopted impact fees – ad hoc, discretionary conditions and fees imposed on a project-by-project basis can bear special potential for government abuse, and local governments should not be permitted to charge fees for the same type of development conditions, such as the dedication of land, which would require compensation under the Takings Clause. *See, e.g., Ehrlich v. City of Culver*, 911 P.2d 429, 443-44 (Cal.4th), *cert. denied*, 519 U.S. 929 (1996); *Clark v. City of Albany*, 904 P.2d 185, 189 (Or. App. 1995), *review denied*, 912 P.2d 375 (1996) ("For purposes of takings analysis, we see little difference between a requirement that a developer convey title to the part of the property that is to serve a public purpose, and a requirement that the developer himself make improvements on the affected and nearby property and make it available for the same public purpose.")

generally applicable water resource development fee. Finding the legislative ordinance cloaked with a presumption of validity, the Arizona Supreme Court refused to apply the *Nollan/Dolan* standard.

> . . . [I]mpact fees are designed to assist in raising the capital necessary to meet needs that surely will arise in the foreseeable future but whose precise details may not at the outset be quite clear. To require more fixed and certain plans would make it difficult, if not impossible, to prepare in advance for the consequences of continued growth.

Home Builders Ass'n of Central Arizona, 930 P.2d at 997.

Similarly, *McCarthy v. City of Leawood,* 894 P.2d 836 (Kan. 1995), also a case cited by Drebick, involved a TIF calculated using generally accepted traffic engineering principles. Although property owners argued that the fee was a taking, the Kansas Supreme Court concluded that "there is nothing in the [*Dolan*] opinion, however, which would apply the same conclusion to Leawood's conditioning certain land uses on payment of a fee. The landowners cite no authority for the critical leap which must be made from a fee to a taking of property." *McCarthy*, 894 P.2d at 845.

The Maryland Court of Appeals has also refused to apply *Dolan's* heightened scrutiny to legislatively adopted TIFs imposed as a condition of building permit issuance. *Waters Landing Ltd. Partnership v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994) ("We think *Dolan*, which concerned the Fifth Amendment Takings Clause, is irrelevant to the issue of special benefit assessments and generally inapplicable to this case.")

In an attempt to undermine this wealth of uniform authority, Drebick cites two cases, *Home Builders Ass'n of Dayton and the Miami Valley, et al. v. City of Beavercreek,* 729 N.E.2d 349 (Ohio), *reconsideration denied,* 732 N.E.2d 1002 (Ohio 2000) and *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page,* 649 N.E.2d 384 (Ill. 1995), to suggest a split among the lower courts regarding *Nollan* and *Dolan's* appropriate applicability. Careful analysis reveals that although the courts in those cases claimed to apply *Dolan's* rough proportionality standards to legislatively adopted impact fees, in practice, they did not. Accordingly, no such split exists.

For example, in *Home Builders Ass'n of Dayton,* the Ohio Supreme Court claimed to apply *Dolan's* rough proportionality standard to TIFs, but it did not conduct the individualized, site specific analysis *Dolan* requires. Instead, it applied a *Penn Central*-like analysis, giving appropriate deference to the legislative enactment.[22] The Ohio court acknowledged that "[g]iven that impact fee ordinances are not subject to precise mathematical formulation, choosing the best methodology is a difficult task that the legislature, not the courts, is better able to accomplish. Rather, a court must only determine whether the methodology used is reasonable based on the evidence presented." *Home Builders Ass'n of Dayton,* 729 N.Ed.2d

[22] The ordinance methodology described by the Ohio court is remarkably similar to the methodology adopted in the City's TIF ordinance here. *See* discussion *supra.* As a result, the Ohio Supreme Court would likely have reached the same result as the Washington Supreme Court did in this case – application of the TIF ordinance is not a taking.

at 357.[23] Although it claimed to apply the *Dolan* standard, the court did not require any evidence of the individualized impact the particular development would have on the transportation infrastructure otherwise required by *Dolan*.[24]

The same analytical flaw plagues *Northern Illinois Home Builders*, another case cited by Drebick, which predates the *Del Monte Dunes* decision and this Court's subsequent regulatory takings decisions. Like the Ohio court, the *Northern Illinois* court claimed to apply a heightened standard of review akin to *Dolan*, under its prior decision in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 176 N.E.2d 799 (Ill. 1961). The Illinois court, however, did not employ an individualized, site-specific analysis of impacts. Instead, applying a more deferential standard, the court accepted the city's fee calculation, which was based on an ordinance that predetermined area-wide fees without considering the particular characteristics of a specific development. *Northern Illinois Home Builders*, 649 N.E.2d at 391. Thus, contrary to Drebick's assertion, neither the Ohio nor the Illinois Supreme Court actually applied *Dolan's* rough proportionality standard to

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[23] In that case, the evidence presented consisted of the methodology used to determine the need for roadway improvements funded by the impact fee based on "generally accepted traffic engineering practices," an inventory of existing road facilities, the cost of new facilities needed to accommodate new development generally, and roadway use not associated with new development. *Home Builders Ass'n of Dayton*, 729 N.E.2d at 356-57.

[24] *See also Rogers Machinery*, 45 P.3d at 978 n.13 (citing *Home Builders Ass'n of Dayton*, 729 N.E.2d 349 and noting that although the court in that case states *Dolan* should apply, it does not adhere to the *Dolan* test in its analysis).

generally applicable impact fees.[25] Therefore, there is no conflict among the state high courts and no basis for this Court to grant certiorari.

D. Legislatively Adopted Impact Fee Ordinances Are Subject to Rigorous Statutory Constraints Designed to Prevent Arbitrary Enforcement.

Notwithstanding this well-established and uniform precedent, Drebick argues that this Court should extend *Nollan* and *Dolan's* heightened review standards to legislatively mandated impact fees because they present extraordinary danger of improper leveraging. While courts recognize the possibility that governmental legislation can go too far, in addition to the constitutional constraints outlined in *Palazzolo* and *Penn Central*, legislatively imposed fees are subject to the ordinary constraints of the democratic political process. *San Remo Hotel*, 41 P.3d at 105-06 (Mosk, J., concurring) (noting that a city council charging extortionate fees for all property development unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election). *See also Rogers Machinery,* 45 P.3d at 982.

Moreover, impact fee ordinances like the one at issue in this case have substantial, built-in protections to

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[25] Illinois courts have noted the broad rejection (in *Dolan* itself and in the decisions of numerous state courts) of the specific and uniquely attributable test purportedly relied upon in *Northern Illinois Home Builders*. Yet, Illinois persists in applying this test as a matter of state constitutional law. *See Amoco Oil Co. v. Village of Schaumburg,* 661 N.E.2d 380, 387 n.5 (Ill.App. 1 Dist., 1995), *appeal denied,* 667 N.E.2d 1055 (Ill.), *cert. denied*, 519 U.S. 976 (1996) ("Therefore, the 'specifically and uniquely attributable' test enumerated in *Pioneer Trust* is no longer to be followed when construing the Federal Constitution.")

prevent the kind of extortionary practices that concern Drebick, and to ensure compliance with constitutional standards.[26] Subject to these rigorous legislative parameters, and the constitutional constraints set forth in *Palazzolo, Penn Central* and *Guimont*, specific fee amounts are otherwise entrusted to local legislative bodies' discretion. Impact fee ordinances adopted by local governments around the country are generally required to ensure the fees they impose bear a reasonable relationship to development seeking approval. While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees, the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will

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[26] *See* n.9 *supra.* Additionally, Washington's impact fee statute mandates that local governments may use impact fees to pay only a portion of the cost of system improvements needed to serve new development, and such costs cannot be funded solely through impact fees. RCW 82.02.050(2). Local jurisdictions must impose impact fees through established procedures to ensure that they are not arbitrary or duplicative of fees charged for the same purpose. RCW 82.02.050(1)(c). Impact fees can be collected and spent only for public facilities that are identified in a capital facilities plan that is part of an adopted comprehensive plan. RCW 82.02.050(4). Finally, impact fees must be used to pay for planned system improvements within six years, or are subject to refund. RCW 82.02.070(3); RCW 82.02.080.

Other state impact fee statutes provide similarly rigorous protections. *See, e.g., Home Builders Ass'n of Central Arizona,* 930 P.2d at 995 (citing A.R.S. §9-463.05); *Rogers Machinery,* 45 P.3d at 968-69 (describing Washington County Code, chapter 3.17, the TIF ordinance); *Home Builders Ass'n of Dayton,* 729 N.E.2d at 351-52 (describing City of Beavercreek's impact fee, 93-62); *Homebuilders Ass'n of Metropolitan Portland,* 62 P.3d at 412-13 (describing District resolution's methodology for calculating system development); *Northern Illinois Home Builders Ass'n,* 649 N.Ed.2d 388-91 (describing Du Page County TIF ordinance). *See also Krupp,* 19 P.3d at 690-91 (describing how the District calculated its plant investment fees.)

not pass constitutional muster. *San Remo Hotel,* 41 P.3d at 106.

In sum, the Petition for Writ of Certiorari fails to cite any case, and the City is aware of none, where a court has extended the heightened standards of *Nollan* and *Dolan* to legislatively adopted, generally applicable, revenue raising impact fees. Drebick's assertion that a split among the courts exists on this issue is simply not accurate. Moreover, legislatively adopted impact fee ordinances are generally structured to ensure that new development does not pay more than its fair share of the cost of infrastructure necessitated by that new development. There is no basis for this Court's review, and Drebick's Petition for Writ of Certiorari should be denied.

E. Any Extension of the *Nollan/Dolan* Standard Has Been Limited to Adjudicative, Discretionary Fees that Are the Direct Analog of a Dedication Requirement.

Although the City acknowledges that some lower courts have narrowly expanded the applicability of *Dolan's* rough proportionality analysis to certain monetary exactions, they have done so *only* when the exaction is the discretionarily-imposed, direct analog of a dedication requirement. *See, e.g., Twin Lakes Development Corp. v. Town of Monroe*, 801 N.E.2d 821 (N.Y. 2003), *cert. denied,* 541 U.S. 974 (2004) (applying *Nollan* and *Dolan* essential nexus and rough proportionality standards to towns decision to condition development approval on payment of fees in lieu of parkland dedication); *Dudek,* 69 P.3d 751 (applying *Dolan's* rough proportionality standard to county's enforcement of ordinance conditioning land division approval on a dedicated road or public recorded

easement); *Ehrlich*, 911 P.2d 429 (applying *Nollan* and *Dolan* to city's decision to condition development approval on payment of fee in lieu of dedication for additional public recreational facilities, but not to art in public places fee); *Clark*, 904 P.2d 185 (applying *Dolan* standard to conditions of development approval requiring applicant to improve road abutting development). Those types of ad hoc, adjudicative land use conditions are not at issue here, and this case is not an appropriate forum to consider whether *Nollan* and *Dolan* have been properly extended to these types of conditions.

Nevertheless, Drebick urges this Court to accept review, claiming the lower courts are split as to whether *Nollan* and *Dolan* should apply to legislatively imposed fees or conditions, as opposed to those imposed as part of an adjudicative process. While it is true that courts have noted a categorical distinction between legislatively adopted impact fees and adjudicatively imposed development conditions, in practice those courts uniformly recognize that categorical distinctions are not controlling when determining the applicability of the *Nollan/Dolan* standard. *See, e.g., J.C. Reeves Corp. v. Clackamas County,* 887 P.2d 360, 365 (Or. App. 1994) ("[t]he nature, not the source, of the imposition is what matters"); *Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. App. 1994) (disregarding *Dolan's* legislative/adjudicative decision, and focusing instead on character of decision to determine whether to apply "rough proportionality" standard).

Instead, courts that have extended the *Nollan/Dolan* analysis to discretionarily imposed mitigation conditions routinely evaluate the nature and purpose of the fee or condition and determine whether it is one that bears the potential for governmental abuse. In *City of Portsmouth*

New Hampshire v. Schlesinger, 57 F.3d 12 (1st Cir. 1995), cited by Drebick, the City sought to impose a low-income housing fee to directly mitigate the loss of such housing as a result of condominium conversion. The First Circuit recognized that the fee, though adopted as an ordinance, was not one of general applicability. Rather, it was directed at a specific group of property owners who converted low-income housing units to condominiums. *Id.* at 12-13. Issued well before this Court's recent regulatory takings pronouncements, the court concluded that these property owners were singled out to bear a burden that should be borne by the public as a whole. The First Circuit then applied *Nolan's* standard to conclude that no rational nexus existed between the fee amount charged to developers and any burden imposed on the City due to the conversion. *Id.* at 14.

In *Town of Flower Mound v. Stafford Estates Limited Partnership,* 135 S.W.3d 620, 642 (Tx. 2004), the Texas Supreme Court declined to adopt a bright line rule regarding *Nollan* and *Dolan's* applicability to adjudicative and legislative decisions, recognizing the need to evaluate the nature and purpose of the development conditions imposed. Although the zoning ordinance at issue in *Flower Mound* required developers to construct and pay for improvements to streets abutting their proposed development if those streets failed to meet specified standards – even if the improvements were not necessitated by the impacts of the new development – it was not a generally applicable fee that applied to all new development for the purpose of improving roads within the community. Moreover, in applying the *Nollan* and *Dolan* standards, the court acknowledged the truly adjudicative nature of the town's refusal to grant an otherwise common zoning

ordinance exception. *Town of Flower Mound,* 135 S.W.3d at 625.

While neither *City of Portsmouth* nor *Town of Flower Mound* is instructive regarding the types of impact fees at issue in this case, they are nevertheless consistent with this Court's pronouncements in *Lingle.* The courts in those cases evaluated the underlying nature of development conditions and determined that they fell within the narrow, limited class of ad hoc, discretionary decisions requiring the dedication of real property or its direct analog such that the heightened scrutiny of *Nollan* and *Dolan* should apply. *Lingle*, 544 U.S. at 546-47. Drebick has cited no case, and the City is aware of none, that expands the heightened standards of *Nollan* and *Dolan* to legislatively adopted, generally applicable impact fees, and Drebick can offer no plausible justification for doing so here. There is no issue of federal law that warrants this Court's review.

CONCLUSION

This Court has determined that the heightened standards of *Nollan* and *Dolan* apply in the limited, narrow context of land use decisions conditioning development approval on the dedication of real property. This Court has also determined that the *Nollan* and *Dolan* standards do not apply to legislatively imposed, generally applicable impact fees, user fees and taxes. The lower federal and state court decisions are consistent with this precedent, as is the decision in this case. Because Drebick

raises no issue justifying further review, this Court should deny the Petition for Writ of Certiorari.

Dated this 13th day of September, 2006.

Respectfully submitted,

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